DUOFORTIS PROPERTIES (M) SDN. BHD.

v.

LIM KAR BEE

HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMED JC
[ORIGINATING SUMMONS NO. 24(31)-321-87]

CIVIL PROCEDURE: *Prayer for declaration to confirm trust - Whether registrable transfer of land can be executed - Subject to the consent of chargor.*

TRUSTS: *Tax saving scheme to avoid payment of estate duty - Execution of document - Whether proper - Whether there was consideration - Whether elements of misrepresentation and undue influence to apply.*

The plaintiffs prayed for a declaration that the defendant hold the subject land in Batu Ferringhi in trust for the plaintiffs and for an order that the defendant execute a registrable transfer of the said land to the plaintiff subject to the consent of the chargee.

The defendant was the owner of the Batu Ferringhi land and a tax saving scheme (EDP Scheme) was devised to avoid the payment of estate duty upon death of the defendant.

The scheme involved members of the family of the defendant and the plaintiff company was incorporated for such purpose.

The case revolves mainly on findings of fact regarding:

(i) whether the parties agree to implement the EDP Scheme;

(ii) whether the Scheme was explained to the defendant and whether he understood it;

(iii) whether the contents of the documents executed or signed by the defendant were explained to him and whether he understood them;

(iv) whether there was consideration for the sale of the Batu Ferringhi land;

(v) whether the defendant executed or signed the documents due to misrepresentation or undue influence;

(vi) whether the transaction was *bona fide* as between the parties.

Held:

[1] On the evidence and on a balance of probabilities the Court is satisfied that the scheme and documents executed by the defendant were explained to the defendant and the defendant understood and knew how it worked and there was consideration involved.

[2] It is unthinkable that a businessman of the defendant's character and intelligence could be misrepresented for so long and the defence of misrepresentation is most improbable in the circumstances of the case.

[3] On the evidence adduced there was no undue influence and dominance of the will of the defendant.

[4] All the parties agreed to have the relevant documents prepared in such a way in order to make the scheme appear to the Tax Department as authentic. There was no lack of *bona fide.*

[Application granted.]

Cases referred to:
Hj. Mohamed Dom v. Sakiman [1956] MLJ 45 ***(foll)***
Aik Nong & Co. Ltd v. Tan Tien Choy ***(cit)***
Haji Ahmat v. Ong Bak Hin [1960] MLJ 20 ***(foll)***
Janagi v. Ong Boon Kiat [1971] 2 MLJ 196 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 28 r. 8

For the plaintiff - Choong Phoi Ying; M/s. Chong & Co.
For the defendant - J.A. Yeoh; M/s. Shearn Delamore & Co.

JUDGMENT

Abdul Hamid Mohamed JC:

This case began by way of an originating summons. The plaintiffs, Duofortis Properties (M) Sdn. Bhd. prayed for a declaration that the defendant held the subject land (Batu Ferringhi land) in trust for the plaintiffs and for an order that the defendant execute a registrable transfer of the said land to the plaintiffs subject to the consent of the chargee, Ban Hin Lee Bank Bhd. (BHL Bank).

By a consent order recorded by my predecessor, Wan Adnan J on 17 August 1988, the parties agreed that the proceedings be continued as if the matter had been begun by a writ. This order was made pursuant to O. 28 r. 8 of the Rules of the High Court 1980.

The hearing of oral evidence began on 28 January l991 and finally concluded on 5 July l991. Learned Counsel for both parties chose to file written submissions, which they subsequently did. I gave my decision in favour of the plaintiffs with costs on 2 November l991. The defendant appealed to the Supreme Court.

As the facts are rather complicated, I shall state the background of the plaintiff's case.

The defendant was the owner of the Batu Ferringhi land. (In fact he is still the registered owner of the said land).

Some time in 1984, a tax saving scheme, which came to be known as the Estate Duty Planning Scheme (EDP Scheme) was mooted. The purpose was to avoid payment of estate duty in the case of the death of the defendant.

As part of the scheme, the plaintiff company was incorporated on 6 December 1984 with Lim Suan Sim (PWl), a daughter of the defendant, and her sister as first directors and subscriber shareholders. The plaintiff company was incorporated for the purpose of purchasing the Batu Ferringhi land from the defendant at the price of RM18,970,000.

Another company, known as Lim Kar Bee Holdings Sdn. Bhd. (the holding company)

was also incorporated, on 25 January 1985, with the defendant and his wife as first directors and subscriber shareholders.

The defendant, having sold the Batu Ferringhi land to the plantiff company, was to request the plaintiff company to transfer the amount standing to his credit in the plaintiff company (that is the sale price of the land) to the holding company. The holding company would in turn credit the defendant with the sum of RMl8,970,000. In other words, the plaintiff company would then be indebted to the holding company for that amount and the holding company would be indebted to the defendant for the same amount.

The holding company would then apply to the plaintiff company for RM18,970,000 ordinary shares in the plaintiff company at RM1 per share. As the plaintiff company would be indebted to the holding company, the shares were to be paid by a set-off against the amount owing by the plaintiff company to the holding company.

Simultaneously, the defendant himself was to apply for 1,355,000 ordinary shares in the holding company at a premium of RM13 per share giving a total value of RM18,970,000, equivalent to the purchase price of the Batu Ferringhi land.

The 1,355,000 ordinary shares in the holding company were to be paid for by the defendant by way of a set-off against the RM18,970,000 credited to the defendant's favour by the holding company.

After the allotment of the 1,355,000 ordinary shares in the holding company to the defendant, the defendant, together with his wife were to apply to the holding company for the conversion of his ordinary shares into non-convertible cumulative preference shares (NCCP shares). Towards this end, the holding company was to pass a resolution by way of an extraordinary general meeting to convert all the defendant's ordinary shares as well as the two subscriber shares held by the defendant and his wife into 1,335,002 NCCP shares of RMl par value.

The defendant and his wife, as holders of NCCP shares would have no voting rights in the holding company. However, they would be entitled to non-convertible cumulative preference dividend (NCCP dividend) at the rate of 2% per annum.

At the same time, members of the defendant's family were to apply for ordinary shares in the holding company.

It was not disputed that they applied and were issued with the following number of shares:

(i) Ooi Siew Yook - 100 ordinary shares

(ii) Lim Poh Bin - 100 ordinary shares

(iii) Lim Poh Eng - 100 ordinary shares

(iv) Lim Suan Wah - 100 ordinary shares

(v) Lim Suan Sim - 100 ordinary shares

(vi) Lim Suan Ai - 100 ordinary shares

(iv) Lim Kar Bee and

Ooi Siew Yook (as trustees for Lim Poh Beng's children)	-	100 ordinary shares
	-	800 ordinary shares

According to PWl, the 100 ordinary shares were held in trust for Lim Poh Beng's children because the defendant was not in good terms with Lim Poh Beng and refused to allow any share to be issued to the latter.

The 800 ordinary shares were paid for by the family members themselves.

As part of the EDP scheme also, the defendant and his family members were to transfer their respective shares in the other family companies to the holding company. However, this was not done except for the two subscriber shares of PWl and her sister in the plaintiff company. Two reasons were given:

(a) a dispute arose between the defendant and members of his family, apparently over another woman in the defendant's life; and

(b) such transfers would have attracted tax under the Share (Land Based Company) Transfer Tax Act 1984.

Had the scheme been completed, the holding company would end up owing the entire share capital of the plaintiff company, including the Batu Ferringhi land. The holding company would also have had control over all the family companies. For selling his Batu Ferringhi land, the defendant would end up owning 1,335,001 NCCP shares in the holding company of RM1 par value earning a fixed NCCP dividend at a rate of 2% per annum.

Towards this end, the following documents were executed or signed by the defendant:

(1) letter from HRM (Tax Services) Sdn. Bhd. dated 11 October 1984 (Pl) authorising the said firm to carry out the EDP Scheme;

(2) the sale and purchase agreement dated 1 April 1985 (P3) whereby the Batu Ferringhi land was sold by the defendant to the plaintiff company for RM18,970.000.

(3) a declaration of trust dated 26 April 1985 (P28) whereby the defendant declared that he held the Batu Ferringhi land in trust for the plaintiff company;

(4) the holding company's director's circular resolution dated 17 May 1985 (P6) appointing PWl and Lim Suan Ai (another daughter) as additional directors;

(5) Minutes of extraordinary general meeting of the holding company dated 5 April 1985 (P7), amongst other things, converting the 1,355,002 ordinary shares to NCCP shares;

(6) Minutes of the sixth board of directors' meeting of the holding company held on 6 April 1985 (P8) approving the application of 800 ordinary shares of the holding company by members of the family;

(7) Form of application of shares of the holding company by the defendant and his wife as trustees for Lim Poh Beng's children dated 4 April 1985;

(8) Minutes of the First Directors' Meeting of the holding company held on 11 February 1985 (P12) which, *inter alia*, appointed the defendant and his wife First Directors of the company and allotted and issued one ordinary share each to the defendant and his wife;

(9) letter from the defendant to the plaintiff company dated l April 1985 (P14) offering the Batu Ferringhi land for sale to the plaintiff company;

(10) letter from the defendant to the plaintiff company dated 2 April 1985 (P16) requesting the plaintiff company to transfer his credit balance of RM18,970,000 standing in the accounts of the plaintiff company to the holding company;

(11) Minutes of the Second Directors' Meeting of the holding company dated 2 April 1985 (P17) whereby the defendant's account in the holding company was credited with the sum of RM18,970.000;

(12) Letter from the defendant to the holding company, dated 2 April 1985 (P18) informing the holding company of (10) and requesting (11);

(13) Letter from the holding company to the plaintiff company dated 3 April 1985 (P10) applying for RM18,970,000 ordinary shares of the plaintiff company for the holding company;

(14) Form for application of shares of the plaintiff company by the holding company dated 3 April (P21);

(15) Minutes of the Third Directors' meeting of the holding company dated 4 April 1985 (P22) authorising the board of directors of the holding company to purchase RM18,970,000 ordinary shares of the plaintiff company and for that purpose authorising the plaintiff company to debit the amount of RM18,970,000 against the amount standing as credit in the plaintiff company;

(16) Minutes of the fourth meeting of the board of directors of the holding company dated 4 April 1985 (P23) accepting the defendant's application for 1,335,000 ordinary shares by the holding company;

(17) Form for application of the 1,335,000 ordinary shares of the plaintiff company by the holding company mentioned in (16) dated 4 April 1985 (P24);

(18) Letter from the defendant to the holding company dated 5 April 1985 (P25) requesting for the conversion of the defendant's 1,335,001 ordinary shares to the same number of 2% NCCP shares;

(19) Directors' circular resolution of the holding company (P29) resolving that an account of the holding company be opened with Hongkong and Shanghai Banking Corporation with the defendant and his wife as joint signatories;

(20) Trustees' resolution dated 3 April 1985 (P69) authorising the trustees (defendant and his wife) to open a current account with the Malayan Banking Bhd. with the defendant and his wife as signatories;

(21) Trust deed dated 8 April 1985 (P70) in respect of 100 ordinary shares in the holding company which was witnessed by an advocate and solicitor (PW3);

(22) Trust deed made on 3 April 1985 (P75) for the benefit of the children of Lim Poh Bin, which was witnessed by the same advocate and solicitor (PW3).

At a first glance the execution or signature of these documents appears to be suspicious as many of them were executed or signed at about the same time. This is even more so when PWl, during examination-in-chief, said that various meetings of the board of directors of both the plaintiffs and the holding company's were held on the same day though the minutes show different dates. Furthermore, no cash payment was made or received for the sale of the Batu Ferringhi land, contrary to what is stated in the sale and purchase agreement (P3).

But it must be remembered that the defendant did not dispute that he executed or signed all those documents. All that he said was that the contents of those documents were not explained to him, that he was misrepresented by his daughter (PWl) and that he executed or signed those documents under undue influence.

Whether' the Scheme and the Documents were Explained to the Defendant

On the question whether the scheme and the documents were explained to the defendant, evidence of PW1, PW2, PW3 and PW5 is material.

PW1 is the defendant's daughter, an accountant by profession who assisted her father in his daily business since she returned from Australia around 1986. She was very involved in the whole scheme. She admitted that she was her father's right-hand person since 1983.

PW2 Ho Sen Seck is an advocate and solicitor, a partner in the firm of Gan Teik Chee & Ho. He was the person who witnessed the defendant's signature in the sale and purchase agreement (P3).

PW3 is Mr. Gan Teik Chee, the advocate and solicitor who had known the defendant for more than twenty years. He described his relationship with the defendant as "more than professional relationship". They became friends. According to him, and I have no reason to doubt this, the defendant and his companies had used his (Mr. Gan's) firm to render professional services. His firm did "a lot of service" for the defendant and his, companies since mid - 1980s. They prepared the sale and purchase agreement (P3). He also prepared the declaration of trust dated 26 April 1985 (P28), the trust deed dated 6 April 1985 (P70), the trust deed dated 3 April 1985 (P75) and attested the defendant's signatures on them.

PW5, the tax consultant was the brain behind the scheme. He joined HRM (Tax Services) Sdn. Bhd. in 1984. Defendant had been a client of the firm before he joined it. He came to know the defendant after he joined the firm. He was the officer assigned by the firm to undertake the preparation and execution of the EDP scheme for the defendant.

I shall not reproduce their evidence for the sake of brevity. Suffice for me to say that both PW2 and PW3 testified that they explained the contents of the documents executed by the defendant and attested them. Similarly both PW2 and PW5 testified that the scheme as well as all the documents executed or signed by the defendant were explained to him, that he understood them and that he never complained that he did not understand them, indeed he was happy with the scheme. PWl also gave evidence to the same effect.

I do not think it would be an exaggeration to say, generally that is, that the defendant's evidence consists mainly of denials. He denied that the scheme was

explained to him. He denied that the documents which he executed or signed were explained to him. His reason for signing them was, again and again, because of his daughter (PW1) said that they were for Government Departments for money to be refunded to him. He denied executing the documents attested by PW2 and PW3. He denied that they explained the contents to him. He denied instructing PW3 to prepare the sale and purchase agreement (P3), the declaration of trust (P28) or the trust deed (P70 and P75) and many other things.

I considered the evidence adduced by the plaintiffs and the defendant. I was satisfied on the balance of probabilities, that the scheme and the documents executed or signed by the defendant were explained to the defendant, that the defendant understood and knew how it would work, at least as envisaged by all of them, and he knew what the documents executed or signed were for.

The defendant tried to make it appear to Court that he was illiterate, ignorant and naive. He claimed that he could read and write a bit in Chinese, whereas his daughter said, "He reads a lot of Chinese Newspapers and he understands all the contents." I accept that he cannot read or write in English or Malay. But I am of the view that he is not illiterate or ignorant. True that he started as a mason but as early as 1947 he became a contractor and over the years, in his own words, specialised in civil and engineering works, construction of bridges and highways. He incorporated eight companies which from the names show that they deal in construction, plantation, trading, realty and steam laundry. He had an office in Penang and Kuala Lumpur. He even incorporated an investment company in Hong Kong in 1983 and was involved in buying and selling land in Hong Kong. Definitely one needs some (if not a lot of) intelligence and business acumen to be able to do all those things and, I think I can safely add, successfully.

Secondly, from the evidence given by his own daughter (PW1), his long-time friend and lawyer (PW3), the tax consultant (PW5), from the way he answered questions in Court, it is beyond doubt that the defendant is a person of very strong character, the type of person who would not normally trust anybody, even members of his own family, and would not execute or sign documents unless he is satisfied what they are for.

On the balance of probabilities, I am of the view that the defendant understood the nature of the scheme and the contents of the documents he executed or signed.

Misrepresentation

The defendant alleged that he executed or signed all the documents in question because his daughter (PWl) had misrepresented to him that they were meant for Government departments and for the return of money due and owing to him.

If it involves only one letter and prepared by PWl and signed in the presence of only both of them, it may be quite probable. But there are numerous documents involved, a number of meetings held, attended not just by the two of them but also by professional advisors. In the words of Mr. Gan Teik Chee (PW3), the scheme "was discussed over a few months". This is supported by the documentary evidence produced. As early as 11 October 1984, he signed the letter authorising HRM to carry out the scheme - see Pl. From then on he executed or signed numerous documents and letters. It is unthinkable that a businessman of the defendant's

character and intelligence (I say he is an intelligent person) could be misrepresented for so long and on so many occasions by his daughter on the flimsiest ground that the documents were meant for Government departments and for the return of money due to him from the Government. The defence of misrepresentation is most improbable in the circumstances of the case.

Undue Influence

A number of authorities were cited to me on undue influence.

I prefer to return to the basics, that is s. 16 Contract Act 1950.

> 16. Undue Influence:
>
> (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
>
> (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another:
>
> (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
>
> (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
>
> (3)(a) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.
>
> (b) Nothing in this subsection shall affect s. 111 of the Evidence Act 1950.

On the evidence adduced in this case, I am of the opinion that neither the defendant's daughter (PWl) nor Mr. Gan Teik Chee, the advocate and solicitor (PW3) nor Mr. Ung Peng Joo, the tax consultant (PW5) nor, for that matter, anybody else was in a position to dominate the will of the defendant. Seeing and hearing the defendant during the trial, I would think that the reverse is more probable. The burden of proof remained with the defendant and the defendant had not discharged that burden. In fact, in the circumstances of this case, even if the burden were on the plaintiff, I am clearly of the view that the plaintiffs had discharged the burden.

Failure of Consideration

Learned Counsel for the plaintiff objected to the defendant's reliance on this ground as, he submitted, it was never pleaded. On the other hand, learned Counsel for the defendant submitted that the defendant did plead that ground. He referred to para. 24 of the defendant's affidavit in reply, bundle A at p. 27:

> I aver and verily believe that there is a design on the part of my wife, my sons, Lim Poh Beng, and Lim Poh Eng, and my daughter, Lim Suan Sim, to divest me of the only property left in my name...

It is trite law that civil cases are to be decided on the issues raised on record - see *Haji Mohamed Dom v. Sakiman; Aik Nong & Co. Ltd. v. Tan Tien Choy* . The Court

should not give effect to an entirely new case which the party has not made out in his pleadings - see *Haji Ahmat v. Ong Bak Hin; Janagi v. Ong Boon Kiat*

The question is whether the passage referred to above is a pleading that the sale and purchase of the Batu Ferringhi land was without consideration. I do not think so. I do not think that any reasonable person reading that passage would understand it as a pleading of absence of consideration. The defendant should not be allowed to rely on this ground.

However, even if I were wrong, it is clear from the evidence, that, even though the sale and purchase agreement (P3) mentioned that the consideration was cash, in fact it was not cash. The consideration was the allotment of shares. In short, there was consideration.

Transaction not bona fide

Learned Counsel for the defendant tried very hard to show that the whole scheme was not a *bona fide* scheme and the sale and purchase of the land was not a *bona fide* transaction. Among other things, it was pointed out that the sum of RM18,970,000 was not paid to the defendant, even though the sale and purchase agreement (P3) stated that it was paid and besides, the various meetings of Board of Directors were held on the same day, even though the minutes bear different dates.

But, that was the plaintiff's case throughout.

I have no doubt whatsoever that all the parties agreed to have the relevant documents prepared that way in order to make the scheme appear to the Department of Inland Revenue to be authentic. There was no lack of *bona fide* as between them. If there was any lack of *bona fide*, it was as between them on the one hand and the Department of Inland Revenue on the other. But as that was not in issue I make no decision on it.

Conclusion

Even though the scheme appears to be very complex, numerous documentary exhibits were produced, numerous authorities were cited, lengthy submissions were made, the case actually turns mainly on findings of facts:

(a) whether the parties agreed to implement the EDP scheme;

(b) whether the scheme was explained to the defendant and whether he understood it;

(c) whether the contents of the documents executed or signed by the defendant were explained to him and whether he understood them;

(d) whether there was consideration for the sale of the Batu Ferringhi land;

(e) whether the defendant executed or signed the documents due to misrepresentation or undue influence;

(f) Whether the transaction was *bona fide* as between the parties.

On the balance of probabilities I answer questions (a), (b), (c), (d) and (f) in the affirmative and question (e) in the negative.

Effect, therefore, must be given to the documents, in particular the sale and purchase agreement (P3) and the declaration of trust (P28). I therefore gave an order in terms of prayers (i) and (ii) of the originating summons with costs.

Also found at [1992] 1 CLJ 669